Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

ARTHUR SCOTT CLAY,

Petitioner,

v.

DAVID DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, AND THE OFFICE OF THE PLATTE COUNTY PROSECUTING ATTORNEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether—as the Second, Fourth, and Seventh Circuits have held—this Court's decision in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992), allows a habeas corpus petitioner to make a showing of "actual innocence" in the sentencing phase of a non-capital case, or whether—as the Eighth and Tenth Circuits, and the court below, have held—this Court's decision in *Sawyer* may be applied to sentencing determinations only in capital cases.

PARTIES TO THE PROCEEDINGS

Arthur Scott Clay was the relator below and is the petitioner in this Court.

David Dormire, Superintendent of the Jefferson City Correctional Center, and the Office of the Platte County Prosecuting Attorney were the respondents below and are the respondents in this Court.

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Petition for a Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

Arthur Scott Clay respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS BELOW

The December 5, 2000 opinion of the Supreme Court of Missouri is reported at 37 S.W.2d 214 and is reproduced in the appendix hereto ("App.") at 1a. The November 23, 1999 Opinion and Order of the Missouri Court of Appeals, Western District, granting Clay's petition for habeas corpus and

petition for writ of mandamus is available at 1999 WL 1054129 and is reproduced at App. 16a.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on December 5, 2000. App. 1a. On January 9, 2001, that court denied a timely filed motion for rehearing. App. 29a-31a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

As applicable to this case, Section 195.290 of the Missouri Code, subsequently repealed, provided:

> After a period of not less than six months from the time that an offender was placed on probation by a court, such person, who at the time of the offense was twenty-one years of age or younger, may apply to the court which sentenced him for an order to expunge from all official records, except from those records maintained under the comprehensive drug abuse prevention and control act, as enacted in 1970, and all recordations of his arrest, trial and conviction. If the court determines, after a hearing and after reference to the controlled dangerous substances registry, that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any offenses, or repeated violation of the conditions of such probation, he shall enter such order. The effect of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and conviction. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial or conviction in response to any inquiry made of him for any purpose.

Section 557.036.2 of the Missouri Code provides, in pertinent part:

> The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless:
>
> (1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt; or
>
> (2) The state pleads and proves the defendant is a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender as defined in section 558.016, RSMo, a persistent sexual offender as defined in section 558.018, RSMo, or a predatory sexual offender as defined in section 558.018, RSMo.

Section 557.036.4 of the Missouri Code provides, in pertinent part:

> If the defendant is found to be a prior offender, persistent offender, dangerous offender or persistent misdemeanor offender as defined in section 558.016, RSMo:
>
> (1) If he has been found guilty of an offense, the court shall proceed as provided in section 558.016, RSMo; or
>
> (2) If he has been found guilty of a class A felony, the court may impose any sentence authorized for the class A felony.

INTRODUCTION

Petitioner Arthur Scott Clay ("Clay") was sentenced as a prior offender under Missouri law. In its decision below, the Supreme Court of Missouri recognized that Clay was not, in fact, a prior offender. Nevertheless, the court rejected Clay's

habeas corpus claim that such sentencing violated his rights under the Due Process Clause of the Fourteenth Amendment and Missouri law because Clay did not raise that claim at trial, in his post-conviction motion, or on direct appeal. The court so held based on its erroneous view that this Court's decision in *Sawyer* v. *Whitley*, 505 U.S. 333 (1992)—holding that a habeas petitioner may raise an otherwise procedurally-barred constitutional claim by showing that he is "actually innocent" of an element essential to the imposition of his sentence—cannot be applied to the sentencing phase of non-capital cases.

This petition calls upon the Court to resolve a widespread and direct conflict among the federal and state appellate courts on this important question of law. Three circuits have held that the *Sawyer* "actual innocence" rule applies to the sentencing of defendants in non-capital cases. Two circuits have held, like the court below, that *Sawyer* applies only to capital cases. As explained below, this Court should grant certiorari and resolve this enduring conflict in order to ensure that *Sawyer* is interpreted and applied uniformly throughout the Nation.

STATEMENT OF THE CASE

1. **Petitioner's Concededly Illegal Sentence.** There is no dispute in this case that Clay was illegally sentenced as a prior offender even though he was not a prior offender as defined by Missouri law. In 1974, Clay, then only nineteen years old, pled guilty to one count of distributing hashish. He was sentenced to probation, which he completed successfully. In 1980, pursuant to Section 195.290 of the Missouri Code as it then existed, Clay petitioned the Circuit Court of Platte County to expunge his 1974 conviction. Section 195.290 allowed those who were under the age of twenty-one at the time of their offense, and who had committed no other subsequent crimes, to petition for expungement of their

conviction. The statute expressly stated as follows regarding the issuance of the expungement order:

> The effect of such order shall be to restore such person, *in the contemplation of the law*, to the status he occupied prior to such arrest and conviction. [Sec. 195.290 RSMo 1978 (repealed 1989) (emphasis supplied).]

Having met all of the necessary requirements, Clay's request for expungement was granted, in chambers, on July 2, 1980. Although the standard procedure in Missouri following the entry of such an order was to place the signed order in the court's file and mail copies to the parties, this procedure was, inexplicably, not followed in this case. App. 18a. Likewise, for reasons that are not clear from the record, Clay's conviction was not formally expunged as it should have been. *Id.* at 19a. Accordingly, as a result of the State's own negligence, Clay had no notice or knowledge that his request for expungement had, in fact, been granted.

On September 13, 1988 Clay was charged with a new offense. On January 17, 1989, after the prosecutor introduced a copy of the conviction that should have been expunged from Clay's record years earlier, Clay was found to be a prior offender by the same judge who had ordered the expungement of his conviction eight years earlier. App. 2a. On April 18, 1989, the jury convicted Clay.

Missouri law at that time mandated that Clay be sentenced by the same jury which determined guilt or innocence. Mo. Rev. Stat. § 557.036.2. In direct contravention of this statute, however, the judge, not the jury, sentenced Clay to a term of twenty years based on the judge's erroneous determination that Clay was a prior offender, which itself resulted from the State's failure to expunge his conviction. *See* App. 2a; Mo. Rev. Stat. § 557.036.4. Moreover, the judge further violated Clay's rights by considering the prior conviction in determining the length of his sentence. App. 2a. Had the State properly expunged the prior conviction, the jury could not

have been informed of anything related to Clay's 1974 conviction. Mo. Rev. Stat. § 557.036.2. In 1991, the Missouri Court of appeals affirmed Clay's conviction and the denial of his post-conviction motion. App. 3a.

On June 25, 1992, Clay wrote to the Platte County Clerk's Office to request "the judgments and orders of my convictions for prior felonies." App. 19a. In its response, the Platte County Clerk informed Clay that her office had no record of any past convictions with the exception of the conviction pursuant to which he is currently incarcerated. *Id.* There is no indication in the record of this case that Clay had knowledge or notice that the expungement order had been entered in 1980 until he received this response from the Platte County Clerk in 1992. App. 23a. Therefore, it was impossible for him, at his 1989 trial, in his statutory post-conviction motion, or on direct appeal to have argued that the court should not have sentenced him as a prior offender due to an expungement order he did not know had been entered.

A copy of the July 2, 1980 expungement order was finally certified by the Platte County Clerk on August 25, 1992, over twelve years after being entered, and a copy of the certified expungement order was then sent to the office of the Platte County prosecutor. App. 11a. On September 29, 1992, the prosecutor, noting that Clay was now seeking to obtain any and all records regarding him that were currently in the possession of the prosecutor, sought permission from the trial court to remove the record of Clay's conviction prior to providing the prosecutor's records to Clay. *Id.* The record appears to indicate that this request was granted, and that the court further ordered that a complete copy of Clay's records be made available to him. *Id.*

Upon learning of the improper use of his expunged conviction against him during sentencing, Clay promptly filed a writ of habeas corpus in Platte County, alleging, *inter alia*, violations of his constitutional rights. That petition was

dismissed on improper venue grounds. Clay then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri raising the same issues, which was denied on August 29, 1995. The Eighth Circuit affirmed on the ground that Clay had failed to fully exhaust all available state court remedies. *Clay* v. *Gammon*, No. 95-3789WM, 1996 WL 343019 (8th Cir. June 24, 1996).

2. The Decision of the Missouri Court of Appeals. Following the decision of the Eighth Circuit, Clay sought relief in the Missouri Court of Appeals, Western District, which appointed counsel. After a hearing on the merits, the court unanimously ruled in favor of Clay, issuing a writ of habeas corpus, as well as a writ of mandamus directing that his prior conviction be formally expunged. *See* App. 27a-28a.

When considering Clay's petition, the Court analyzed whether Clay was entitled to habeas relief for the violation of his rights by examining whether he demonstrated "manifest injustice." App. 20a-26a. The inquiry into manifest injustice, in turn, "require[d] the court to consider whether [the] movant had a valid reason for not raising the issue at a prior procedural juncture, such as on direct appeal or in a post-conviction motion." App. 22a. Finding Clay's situation analogous to its prior decision in *Brown* v. *Gammon*, 947 S.W.2d 437 (Mo. Ct. App. 1997)—in which the court granted relief to a habeas corpus petitioner who did not deliberately bypass an opportunity for strategic reasons—the court found that

> Mr. Clay was unaware of the expungement, and thus unaware of the grounds he now asserts provide him with a right to habeas corpus relief, until he received a copy of the expungement order [in 1992] after the Platte County prosecutor requested permission to expunge his records of Mr. Clay's prior conviction without providing him with a copy of those records. [App. 23a.]

In addition, the Court of Appeals found that Clay did not fail to timely bring this claim for strategic reasons. As the court held, "Mr. Clay had no reasonable incentive for not mentioning the expungement; this course of action could only hurt him by denying himself a jury-determined sentence." App. 24a. Furthermore, the court found that "subsequent to learning in 1992 that the expungement order had been granted, Mr. Clay diligently took steps to obtain relief." *Id.* The court therefore held "that Mr. Clay is entitled to raise the issue of his wrongful confinement by means of habeas corpus and that his failure to raise it on direct appeal or in his post-conviction motion did not constitute a waiver of his right to habeas corpus relief." *Id.*

The court further found that the evisceration of "Mr. Clay's right to jury sentencing rises to the level of manifest injustice" because the "right to jury recommendation of sentence is granted by statute, and the sentence recommended by the jury will constitute the maximum punishment which the court can impose." App. 25a (citation omitted). After a thorough analysis of Clay's case, the court held that "[t]he evidence was *indisputably insufficient* to support [the finding of prior offender status] once the expunged conviction is excluded." *Id.* (emphasis supplied). The court therefore granted Clay's request for habeas corpus relief and for a writ of mandamus expunging his record. App. 27a-28a.

3. The Decision of the Supreme Court of Missouri. The Supreme Court of Missouri upheld the Court of Appeals' issuance of a writ of mandamus expunging Clay's record, recognizing that Clay "has a clear, unequivocal, specific and previously-adjudicated right to have his prior conviction expunged." App. 7a. Nevertheless, over the strong dissent of two Justices, the court vacated the writ of habeas corpus, holding that Clay was procedurally barred from raising his constitutional claims. App. 6a-7a.

In reaching this conclusion, the court stated that its "manifest injustice" standard "is essentially the same * * * as the term 'miscarriage of justice' or 'fundamental miscarriage of justice' used in federal habeas cases." App. 4a (internal citation omitted). In applying that standard, the court expressly adopted this Court's habeas corpus precedents and standards: "Following the lead of the United States Supreme Court's habeas corpus cases, and most recently *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner 'to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " App. 4a-5a (quoting *Schlup*, 513 U.S. at 327). Citing this Court's emphasis on finality and the conservation of judicial resources, the court flatly stated that "[t]hese interests * * * justify the same approach in Missouri." App. 5a.

The court then turned its attention to this Court's decision in *Sawyer* and, without any recognition whatsoever of the clear split in authority on how *Sawyer* should be interpreted, stated that "[w]ith the exception of the penalty phase in capital cases, manifest injustice under the 'actual innocence' standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process." App. 6a (citing *Sawyer*, 505 U.S. at 340; footnote omitted). The court therefore concluded that Clay was procedurally barred from raising his constitutional claims because it interpreted this Court's precedents as not allowing Clay to argue that he was actually innocent of being a prior offender. App. 6a. And the court so held even though it recognized, through its affirmance of the writ of mandamus, that Clay was not, in fact, a prior offender under Missouri law.

Following this ruling, Clay filed a timely motion for rehearing expressly arguing that he was actually innocent of being a prior offender. The Supreme Court of Missouri denied that motion on January 9, 2001. App. 29a-31a.

REASONS FOR GRANTING THE WRIT

The question presented by this case is straightforward: under this Court's decision in *Sawyer*, may a habeas corpus petitioner make a showing of actual innocence—thereby allowing him to raise a constitutional claim held to have been procedurally defaulted—in the sentencing phase of a non-capital case?[1] This straightforward question, however, has resulted in an entrenched and irreconcilable conflict among the federal and state courts that have addressed it. To date, three federal circuits—the Second, Fourth, and Seventh—have held that *Sawyer* applies to the sentencing phase of non-capital cases. The Fifth Circuit has twice assumed, without deciding, that this is the correct interpretation of *Sawyer*. By contrast, two circuits—the Eighth and Tenth—have interpreted *Sawyer*, like the court below, as permitting actual innocence claims in the sentencing context only in capital cases. The Sixth Circuit has joined the latter two circuits through unpublished opinions adopting the same rule.

As explained below, this conflict in authority is widespread and persistent, and has been expressly acknowledged by numerous courts and commentators. This case, moreover, presents an appropriate vehicle to resolve the conflict, because it is undisputed that, but for his alleged procedural default, Clay would have been entitled to relief from his concededly illegal sentence. Accordingly, Petitioner submits that the time has come for the Court to grant certiorari to resolve the conflict and clarify the law in this important area.

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[1] Petitioner does not concede that his claim was procedurally defaulted either under Missouri or federal law. Specifically, Clay contends that he cannot be faulted for not raising the fact of his expunged conviction at his 1989 trial, in his post-conviction motions, or on direct appeal, where he had no notice or knowledge that the conviction had been expunged.

I. THE COURT SHOULD RESOLVE THE IRRECONCILABLE CONFLICT ON THE QUESTION PRESENTED

This Court has long held that a habeas petitioner may raise an otherwise defaulted constitutional claim upon a sufficient showing that he is actually innocent of the crime charged. *See, e.g., Murray* v. *Carrier*, 477 U.S. 478 (1986); *Smith* v. *Murray*, 477 U.S. 527 (1986). In *Sawyer*, the Court made clear that this "actual innocence" exception applies as well to the sentencing phase of capital cases. There, the Court held that a habeas court may review a procedurally defaulted constitutional claim relating to the sentencing phase of a capital case, where the habeas petitioner shows "by clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." 505 U.S. at 335-336.

As explained below, however, federal and state appellate courts are now hopelessly divided over whether the actual innocence rule in *Sawyer* may be applied to the sentencing phase of *non*-capital cases. Specifically, courts are split over whether petitioners in non-capital cases are permitted to show—irrespective of a procedural default—that, but for a constitutional error, no reasonable fact-finder would have made a particular finding of fact that was an essential element in the petitioner's sentencing. Three circuits have interpreted *Sawyer* as holding that petitioners may raise such an actual innocence claim in the context of non-capital sentencing determinations, while at least two circuits (like the court below) have interpreted *Sawyer* as not permitting such claims. There is thus a widespread and irreconcilable conflict among the federal circuits which has now spilled over to one of the many state court systems (*see infra* at 18 & n.6) that have followed this Court's actual innocence precedents.[2]

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[2] This Court has jurisdiction to review the decisions of state courts where, as here, such decisions rest on the incorporation of federal law. *See Ohio* v. *Reiner*, No. 00-1028, slip op. at 3 (U.S.

A. The Conflict Is Both Widespread and Irreconcilable

1. The federal and state appellate courts that have addressed the question presented have taken two distinct and irreconcilable positions. The view of *Sawyer* adopted by the court below—that the actual innocence exception to the procedural default bar can be applied in the sentencing context only when capital punishment is involved—was first articulated by the Tenth Circuit in *United States* v. *Richards*, 5 F.3d 1369 (10th Cir. 1993). In that case, the court, citing *Sawyer*, flatly stated that "[a] person cannot be actually innocent of a noncapital sentence." *Id.* at 1371.

Similarly, the Eighth Circuit, in *Embrey* v. *Hershberger*, 131 F.3d 739 (8th Cir. 1997) (*en banc*), *cert. denied*, 525 U.S. 828 (1998), stated that *Sawyer*, by its terms, "applies only to the sentencing phase of death cases." *Id.* at 740.[3] The dissent in *Embrey*, however, strongly disagreed:

> The majority misreads *Sawyer*. The Supreme Court has never ruled the actual innocence exception, articulated as

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Mar. 19, 2001) (per curiam) ("[w]e have observed that 'this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law' ") (quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984)); *Ohio* v. *Robinette*, 519 U.S. 33, 37 (1996) (Court had jurisdiction to review Ohio Supreme Court decision where nearly all cases cited in the state court opinion were federal cases); *South Dakota* v. *Neville*, 459 U.S. 553, 558 & n.5 (1983) (Supreme Court had jurisdiction to review decision because state ground relied on by South Dakota Supreme Court was not independent of federal law); *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979); *see also Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (Court has long reviewed state court decisions when the ground for a state court decision "fairly appears to * * * be interwoven with federal law").

[3] In *Embrey*, the court indicated that in certain "extremely rare" circumstances—likely applicable to Clay—a petitioner's claim may not be subject to a procedural bar when exculpatory evidence not available at trial subsequently comes to light. *Id.* at 741.

> an eligibility test in *Sawyer*, does not extend to cases involving challenges to non-capital sentences. While it is true *Sawyer* involved a challenge to a capital sentence, *Sawyer*'s analysis is not expressly restricted to cases involving capital sentences. [*Id.* at 743.]

In the present case, the Supreme Court of Missouri squarely aligned itself with the Eighth and Tenth Circuits. In the course of its opinion, the court first analyzed this Court's earlier actual innocence precedents, focusing in particular on *Schlup* v. *Delo*, 513 U.S. 298 (1995). *See* App. 4a-6a. The court then expressly followed what it believed to be this Court's actual innocence jurisprudence, concluding that "[w]ith the exception of the penalty phase in capital cases, manifest injustice under the 'actual innocence' standard applies only to the issue of guilt or innocence and is of no avail to claims of error committed during the sentencing process." *Id.* at 6a. (citing *Sawyer*, 505 U.S. at 340; footnote omitted).

By contrast, three federal circuits, including the one which decided this issue most recently, have taken an opposite view. The first court to weigh in on the proper application of *Sawyer* to habeas claims challenging sentencing proceedings in non-capital cases was the Seventh Circuit in *Mills* v. *Jordan*, 979 F.2d 1273 (7th Cir. 1992). The court in *Mills*, after examining *Sawyer* and the Court's earlier actual innocence decisions, held that "[a]lthough Mills' case does not involve capital sentencing, we find similarities between Mills' case and *Sawyer* that justify the application of the actual innocence exception to Mills' sentence as an habitual offender." *Id.* at 1278.

The Seventh Circuit further noted that:

> Although the issue is not well-settled, we conclude that the actual innocence exception applies to habitual offender proceedings such as Indiana's *whether or not they involve the possibility of capital punishment*. To obtain

> the benefit of the actual innocence exception, Mills must therefore show that he is actually innocent of being an habitual offender. [*Id.* at 1279 (footnote omitted; emphasis supplied).]

The Seventh Circuit's ruling in *Mills* was later followed by the Fourth Circuit in *United States* v. *Maybeck*, 23 F.3d 888 (4th Cir. 1994), *cert. denied*, 517 U.S. 1161 (1996). Citing, *inter alia*, *Mills* and the Fifth Circuit's decision in *Smith* v. *Collins*, 977 F.2d 951, 959 (5th Cir. 1992), *cert. denied*, 510 U.S. 829 (1993) (discussed below), the court in *Maybeck* expressly rejected the argument that the actual innocence exception applies in the sentencing context only in capital cases. As the court held, "[e]xcept for the obvious difference in the severity of the sentences, we see little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rationale in non-capital cases." 23 F.3d at 893.

The Fourth Circuit again addressed the issue in *United States* v. *Mikalajunas*, 186 F.3d 490 (4th Cir. 1999), *cert. denied*, 529 U.S. 1010 (2000), in which the court expressly acknowledged the solidifying split in authority. Citing *Maybeck*, as well as the holdings of the Seventh, Eighth, and Tenth Circuits, the court stated that "[t]he [Supreme] Court has not addressed whether the actual innocence exception can be applied to sentencing outside the capital context, and this question has divided the courts of appeals." *Id.* at 494. The *Mikalajunas* court then reaffirmed its ruling in *Maybeck*, reiterating that the actual innocence standard is applicable to non-capital sentencing procedures where (as in this case) a career or habitual offender statute is involved. *Id.* at 495.

Most recently, the Second Circuit, in *Spence* v. *Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162 (2d Cir. 2000), entered the fray. After citing cases on both sides of the conflict in authority, the court stated:

> Because the harshness of the sentence does not affect the habeas analysis and [because] the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures. [*Id.* at 171.]

It therefore held that "the actual innocence exception applies to the sentencing phase of a noncapital trial." *Id.*

2. In addition to the courts on both sides of the question presented in this case, two other federal circuits, the Fifth and the Sixth, have addressed the question. Although the Fifth Circuit has not yet firmly decided the issue, and the precedential value of the Sixth Circuit opinions is unclear, these circuits plainly are leaning in opposite directions. Thus, the decisions of these courts only add to the confusion in the law.

In *Smith* v. *Collins*, *supra*, the Fifth Circuit noted that this Court had, in its then-recent *Sawyer* decision, extended the actual innocence exception to encompass sentencing in capital cases. 977 F.2d at 958. It then noted that, "[w]hile the Supreme Court has not addressed whether the actual innocence exception may apply to the sentencing phase of non-capital trials, a handful of lower federal courts have confronted the issue." *Id.* at 959. For purposes of analysis, the court assumed without deciding that the actual innocence exception to the habeas procedural default bar could be extended to constitutional irregularities in sentencing in non-capital cases. *Id.* Three years later, the Fifth Circuit again confronted the issue in *Sones* v. *Hargett*, 61 F.3d 410 (5th Cir. 1995). In that case the panel expressly noted the circuit split regarding the application of the actual innocence exception to sentencing in non-capital cases and observed that "the Supreme Court has not yet addressed" the issue. *Id.* at 418-419 & n.16. The court, however, stated that "[w]e again decline to resolve this issue and merely assume, *arguendo*, the applicability of the actual innocence standard to non-capital sentencing." *Id.* at 419 n.16.

By contrast, the Sixth Circuit, which has also twice faced this issue, has taken an opposite position, albeit in unpublished dispositions whose precedential value is unclear.[4] In both cases, *Black* v. *United States*, No. 95-5041, 1995 WL 445718 (6th Cir. July 26, 1995), and *Flahardy* v. *United States*, No. 95-5281, 1995 WL 570925 (6th Cir. Sept. 27, 1995), the court followed the Tenth Circuit's decision in *United States* v. *Richards*, 5 F.3d 1369 (10th Cir. 1993), holding that the actual innocence exception may not be applied to habeas claims raising constitutional violations in sentencing in non-capital cases.

3. In light of the sharply divergent holdings of the courts that have considered the issue, the existence of a conflict on the question presented cannot seriously be disputed. As noted above, virtually every court to have addressed the issue since the conflict first arose has noted the split in authority and has expressly rejected the conflicting views of other courts in reaching its own determination.

Furthermore, several district courts have also expressly recognized the conflict. *See Gómez* v. *United States*, 100 F. Supp. 2d 1038, 1048 n.6 (D.S.D. 2000) ("[t]here appears to be a split among the circuits as to whether this exception applies in non-capital cases; the Eighth Circuit has concluded that the exception does not extend to non-capital cases while

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[4] The Sixth Circuit "disfavor[s]" citation to its unpublished decisions, but allows citation to such cases if a party believes "that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well." 6th Cir. R. 28(g). And the Sixth Circuit's own cases do not make clear what, if any, precedential value its unpublished decisions should be accorded. *Compare Mitchell* v. *Rees*, 114 F.3d 571, 580 (6th Cir. 1997) (Keith, J., dissenting) (unpublished opinions "are not given the same precedential value" as published dispositions) *and Hall* v. *Shipley*, 932 F.2d 1147, 1152 (6th Cir. 1991) (stating that unpublished opinions "are of little precedential value") *with Martin* v. *Heideman*, 106 F.3d 1308, 1331 n.5 (6th Cir. 1997) (Krupansky, J., dissenting) (unpublished opinions have "no precedential value within this circuit").

other circuits have held that it does") (internal citation omitted); *Borrego* v. *United States*, 975 F. Supp. 520, 525 (S.D.N.Y. 1997) ("[t]he application of the 'actual innocence' exception to a non-capital sentence also appears to be in accord with at least three courts of appeal"); *Mobley* v. *United States*, 974 F. Supp. 553, 556-557 (E.D. Va. 1997) (noting that, "[w]hile some courts have limited the extension of the 'actual innocence' exception in the context of sentencing to capital sentences, a majority of circuits considering this question have not") (footnote omitted). And commentators have likewise noted the enduring and unresolved split in authority.[5]

B. The Conflict Is Ripe For Resolution By This Court

There is no reason for the Court to allow the conflict to persist. It has been nine years since the Court decided *Sawyer*, and during that time the federal and state courts that have faced the issue have divided themselves into starkly opposing camps. The question presented in this case is thus clearly not one that will resolve itself over time, nor one that will be clarified by the entry of additional courts into the conflict. Indeed, the need for review by this Court is heightened by the fact that what began as a conflict among federal circuits has now further widened to encompass one of the many states that follow this Court's actual innocence juris-

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[5] *See* James J. Sticha, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 Minn. L. Rev. 1615, 1630 (1996) (noting that "[t]he Supreme Court has not addressed whether the actual innocence exception applies to the sentencing phase of noncapital trials" and that the circuit courts that have addressed the issue "disagree over the application of the exception to noncapital cases"); Sean L. Dalton, *Carved in Sand: Actual Innocence in* United States v. Maybeck, 73 N.C. L. Rev. 2388, 2397-2400 (1995) (noting the split among the federal circuits); John P. Hale, *The Federal Circuits' Development, Scope, and Definition of "Actual Innocence" and the Limitation of the Claim by* Herrera v. Collins *and* Sawyer v. Whitley, 71 U. Det. Mercy L. Rev. 1025, 1031 (1994) (same).

prudence.[6] Thus, because this issue affects many states in addition to the federal circuits, the conflict can only deepen, and the confusion become greater, as additional state and federal appellate courts weigh in.

There is similarly no indication that any of the courts that have addressed this issue are likely to change their position. Indeed, the Fourth and Tenth Circuits, which have taken opposing views on the question presented, have expressly affirmed their positions in recent years.[7] Nor is this a situation in which courts have relied on different precedents in reaching their positions, thereby raising the possibility that some courts might re-examine their earlier decisions in light of more recent precedent from this Court. To the contrary, the decisions of the five circuit courts, as well as the decision below, have all expressly purported to interpret this Court's decision in *Sawyer*. Finally, this is not a case in which it is necessary to infer the existence of a split in authority from the analysis of cases that are allegedly in conflict with one

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[6] *See, e.g., People* v. *Hudson*, Nos. 84062 & 84063, 2001 WL 205995, at *2 (Ill. Mar. 2, 2001) (citing *Sawyer* for the proposition that "[i]n order to demonstrate a miscarriage of justice to excuse the application of the procedural bar, a petitioner must show actual innocence"); *State* v. *Redcrow*, 980 P.2d 622, 627 (Mont. 1999) (citing *Sawyer* and *Schlup* and incorporating their definitions of "actual innocence"); *State* v. *Nelson*, 587 N.W.2d 439, 443 (S.D. 1998) (citing numerous federal cases, including *Sawyer*, in explicating the meaning of "actual innocence"); *Ex parte Elizondo*, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (expressly adopting the views of this Court as expressed in *Schlup*); *Hogan* v. *Warden, Ely State Prison*, 860 P.2d 710, 716 (Nev. 1993) (noting that the petitioner "failed to meet his burden of proving 'by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law' ") (quoting *Sawyer*, 505 U.S. at 336).

[7] *See Mikalajunas*, 186 F.3d 490 (4th Cir. 1999); *United States* v. *Piggee*, No. 96-6111, 1997 WL 199195 (10th Cir. Apr. 24, 1997); *Reid* v. *Oklahoma*, 101 F.3d 628 (10th Cir. 1996).

another. Here the lower appellate courts have themselves expressly acknowledged the conflict.

The conflict in authority is thus direct and widespread, and will only continue to grow until this Court clarifies the proper scope of its ruling in *Sawyer*. The time has arrived for this Court to decide the question.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING, AND IS RIPE FOR RESOLUTION IN THIS CASE

The plethora of decisions discussed above make clear that this case presents an important and recurring issue confronted by courts throughout the Nation. Moreover, because there is no genuine dispute that a violation of Clay's constitutional rights is going unremedied due to the Supreme Court of Missouri's incorrect interpretation of *Sawyer*, the question is clearly ripe for resolution in this case.

A. The Petition Presents a Substantial, Unresolved Issue That Requires This Court's Clarification

The numerous cases cited above demonstrate that the application of the actual innocence rule to non-capital sentencing determinations is not an isolated academic issue. Rather, this is a question of law that trial courts are repeatedly required to address and apply. *See, e.g., Prince* v. *Morrow*, No. CIV. 97-1796-ST, 1999 WL 985130, at *10 (D. Or. Sept. 16, 1999); *Talj* v. *United States*, No. 96 Civ. 1926, 1997 WL 705807, at *3 (S.D.N.Y. Nov. 10, 1997); *Borrego* v. *United States*, 975 F. Supp. at 524; *Mobley* v. *United States*, 974 F. Supp. at 556-57; *Hillard* v. *Whitley*, No. 93-3441, 1994 WL 10349, at *4 (E.D. La. Jan. 4, 1994). Thus, without guidance from this Court, non-capital habeas petitioners whose constitutional claims are otherwise procedurally barred will continue to have those claims decided differently depending on where they happen to be incarcerated. Those fortunate to fall under the jurisdiction of the Second, Fourth, Seventh,

and likely the Fifth Circuits will have their constitutional rights vindicated upon a sufficient showing of actual innocence in the sentencing phase, whereas those who fall under the jurisdiction of the Eighth, Tenth, and likely the Sixth Circuits, as well as the Missouri state courts, will have their constitutional rights ignored. This is an intolerable situation, and one that can be remedied only by this Court's intervention.

Moreover, the question presented is clearly a substantial one. Indeed, contrary to the holding of the court below, there should be little doubt that this Court's decision in *Sawyer*, when properly interpreted, extends to the sentencing phase in non-capital as well as capital cases. In prior habeas cases, the Court has expressly rejected the notion that procedural default principles "apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws." *Smith* v. *Murray*, 477 U.S. 527, 538 (1986); *see also Borrego*, 975 F. Supp at 520 (applying the actual innocence exception to non-capital sentences is compelled by this Court's decisions in *Smith* and *Herrera* v. *Collins*, 506 U.S. 390 (1993)). Similarly, the Court has concluded that its holding regarding the provision of counsel to indigent habeas petitioners "should apply no differently in capital cases than in noncapital cases." *Murray* v. *Giarratano*, 492 U.S. 1, 10 (1989) (plurality). As the Second Circuit noted in its recent decision on this issue, simple common sense dictates the same outcome here: "there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Spence*, 219 F.3d at 171. While death sentences obviously differ from other sentences in their severity, there is no legal reason why constitutional claims should be heard and vindicated through habeas relief in one context but not the other.

B. The Clear Constitutional Violation in This Case Warrants This Court's Intervention.

This case is an appropriate vehicle to resolve the persistent conflict because the "actual innocence" issue was squarely decided by the court below, App. 5a-6a, and was central to its holding in this case. It is plain that, had the court properly interpreted this Court's decision in *Sawyer* and allowed Clay to argue that he was actually innocent of being a prior offender, Clay would have established that fact by clear and convincing evidence. *See Sawyer*, 505 U.S. at 336. Indeed, the Supreme Court of Missouri *conceded* that Clay was not a prior offender, and that he therefore should not have been sentenced as such, when it granted his request for a writ of mandamus expunging his prior record. As the court ruled, Clay had a "clear, unequivocal, specific, and previously-adjudicated right to have his prior conviction expunged." App. 7a. It is equally clear, as the Court of Appeals held in this case, that Clay's resulting sentence, based on the erroneous finding that he was a prior offender, was illegal under Missouri law. App. 25a-26a. Yet the Supreme Court of Missouri refused to consider this violation based solely on its view that the actual innocence exception could be applied to sentencing determinations only in capital cases.

Moreover, for the same reason, the court refused to consider Clay's federal constitutional claim that " '[a]brogating [his] statutory right to jury sentencing by the use of a conviction which had been duly expunged according to law denied [him] his rights to * * * due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.' " App. 3a-4a (quoting Clay's Brief to the Supreme Court of Missouri). If, however, the court had not improperly interpreted *Sawyer* as barring Clay's habeas petition, there is no serious question that he would have been entitled to relief under the clear precedent of this Court. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), a state appellate court had affirmed a criminal defendant's sentence under an unconsti-

tutional habitual offender statute, but state law required that the sentence be imposed by a jury instead. The Court held that where state law mandates sentencing by a jury, not a judge, a defendant has a federal due process right to be sentenced in the proper manner. In short, the Court held that a state-created right to jury sentencing is constitutionally protected, via the Fourteenth Amendment, against arbitrary deprivation by the state. *Id.* at 346.

Here, Clay was incorrectly denied his right to be sentenced by a jury—in direct violation of the liberty interest this Court articulated in *Hicks*—by Missouri's *own* failure properly to expunge his prior conviction. Had Missouri carried out what even the Supreme Court of Missouri found was the State's non-discretionary duty to expunge Clay's record, he would not be before this Court today. Furthermore, as clearly held by this Court in *Hicks*, one's liberty interest in a jury sentence does not evaporate merely because the sentence imposed may otherwise have been statutorily acceptable had it been imposed by a jury. Clay's liberty interest consisted of his "substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.* There can be no question that this liberty interest was abrogated when the judge improperly usurped the jury's role. And this *Hicks* violation was compounded when the judge considered Clay's prior offender status in determining the length of his sentence. For these reasons, it is clear that, under *Hicks*, Clay would have demonstrated a violation of his federal constitutional rights if the court below had not interpreted *Sawyer* as preventing him from raising that claim.

Thus, there can be no credible argument that the Court need not reach the actual innocence issue in this case because Clay could not succeed on the merits of his underlying claim.[8] Quite to the contrary, given the undisputed fact,

[8] This case falls within the category of cognizable actual innocence claims under *Herrera* v. *Collins*, 506 U.S. 390 (1993).

expressly recognized by the court below, that Clay was not a prior offender and was therefore illegally sentenced, it is clear that he would be entitled to relief but for the alleged procedural bar. This fact makes this case a particularly appropriate vehicle to resolve the persistent conflict over the proper interpretation of *Sawyer*.

Accordingly, given the persistent, widespread, and irreconcilable conflict among federal and state appellate courts, the important and recurring nature of the question presented, and the vital importance of this issue in vindicating a clear violation of petitioner's federal constitutional rights, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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Under *Herrera*, a petitioner who is actually innocent cannot seek habeas relief without establishing an independent constitutional violation. Unlike the habeas petitioner in *Herrera*, Clay has asserted a clear violation of his due process rights wholly apart from his claim that he is actually innocent of being a prior offender.